

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In re:)	
)	Case No. 02-30456
SOUTHERN ILLINOIS RAILCAR CO.,)	(Jointly Administered with 02-30457)
et al.,)	Chapter 11
Debtors.)	
_____)	

In re:)	
)	
FRED PARSONS & EUGENIA PARSONS,)	Case No. 03-32277
)	
Debtors.)	Chapter 11
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEBTORS'
MOTIONS FOR SANCTIONS

The matter of the Motion of Southern Illinois Railcar Company (“SIRC”) and Southern Illinois Railcar Company, LLC (“SIRC LLC”, jointly with SIRC the “Corporate Debtors”) for Sanctions against Caldwell-Baker Company and Linus L. Baker Pursuant to Bankruptcy Rule 9011, 28 U.S.C. § 1927 and 11 U.S.C. § 105(a) (the “Corporate Debtors’ Rule 11 Motion”) and the Joint Motion of the Corporate Debtors and Fred and Eugenia Parsons (the “Parsons”) for Sanctions against Caldwell-Baker Company and Linus L. Baker Pursuant to Bankruptcy Rule 9011, 28 U.S.C. § 1927 and 11 U.S.C. § 105(a) (the “Joint Rule 11 Motion”, with the Corporate Debtors’ Rule 11 Motion, the “Rule 11 Motions”) came before this Court on October 13, 2004. On that date Bonnie L. Clair appeared as Counsel for the Corporate Debtors, Steven Stanton and Nathan C. Collins appeared as Counsel for the Parsons, David Unseth appeared as Counsel for G Finance Holding Corporation (“G Finance”), and Linus L. Baker appeared *pro se*. No Counsel appeared for Caldwell-Baker Company (“CBC”). As announced at that hearing and

memorialized in the minute entry from that hearing, this Court continued the hearings on the Rule 11 Motions to October 20, 2004.

On October 20, 2004, the Court conducted the continued hearing on the Rule 11 Motions. On that date Bonnie L. Clair appeared as Counsel for the Corporate Debtors, Steven Stanton, Gary True and Nathan C. Collins appeared as Counsel for the Parsons, and David Unseth appeared as Counsel for G Finance. No Counsel appeared for either CBC or Linus Baker, and Linus Baker did not appear *pro se*. Gary Goodman, the Chief Financial Officer for the Corporate Debtors, also was present at that continued hearing. This Court, having reviewed the Rule 11 Motions, the documents captioned “Counsel’s Limited Pro Se Appearance” (Corporate Debtors’ Docket No. 1314/Parsons’ Docket No. 264) and “Supplementation to Pro Se Applications for Stay on Execution of Sanction” (Corporate Debtors’ Docket No. 1327/Parsons’ Docket No. 277) that appear to comprise Linus L. Baker’s and/or CBC’s objection to the Rule 11 Motions filed by the Corporate Debtors and Parsons, and the record in these proceedings; having heard the arguments of Counsel at the October 13, 2004 and October 20, 2004 hearings; and being fully apprised in the premises; now enters its Findings of Fact and Conclusions of Law regarding the Rule 11 Motions as follows:

I. Background

1. The Corporate Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the “Bankruptcy Code”), on February 7, 2002.
2. The Parsons filed their Chapter 11 case on May 30, 2003.
3. On November 26, 2003, this Court entered its Order Confirming Third Amended Plan of Reorganization of Debtors Southern Illinois Railcar Company and Southern Illinois

Railcar Company, LLC Dated July 28, 2003 as Revised on September 5, 2003 and Thereafter Consistent with the Confirmation Hearing (Corporate Debtors’ Docket No. 979) (the “Corporate Confirmation Order”).

4. On November 26, 2003, this Court entered its Order of Confirmation in the Parsons’ Chapter 11 case (Parsons’ Docket No. 220) (the “Parsons Confirmation Order,” together with the Corporate Confirmation Order, the “Confirmation Orders”).

5. CBC did not appear to prosecute its objections to the confirmation of the Corporate Debtors’ or the Parsons’ Chapter 11 Plans. See Corporate Confirmation Order at 6, ¶ Q (“The objections to the Plan by Caldwell-Baker Company have been overruled for failure to prosecute.”); Parsons Confirmation Order at 4, ¶ I (“The objections to confirmation filed by Caldwell-Baker Company were overruled for want of prosecution, the creditor having failed to attend the scheduled hearing thereon on October 29, 2003”).

6. CBC never has filed any appeal from either of the Confirmation Orders.

II. The Revocation Motions

7. On July 21, 2004, CBC filed its Motions to Vacate Portions of Orders Confirming Plans Related to Non-Dischargeable or Non-Core Claims (the “Revocation Motions”) in both the Corporate Debtors’ and the Parsons’ Chapter 11 cases, in which CBC sought to have this Court revoke¹ the Confirmation Orders on grounds that the Confirmation Orders allegedly contain unconfirmable provisions.

¹ The Revocation Motions allege that they seek relief only under the provisions of Federal Rule of Civil Procedure 60(b), which deals with relief from or vacation of an order upon various grounds. However, and as found previously by this Court, the use of the word “vacate”, instead of the word “revoke” used in the United States Bankruptcy Code, see, e.g., 11 U.S.C. §§ 1141, 1230, and 1130, is a distinction without a difference. The Court will not elevate form over substance. Regardless of the caption placed on the Revocation Motions, those Motions constitute motions to revoke confirmation.

8. The Revocation Motions were presented to the Court by Linus Baker, acting as Counsel for CBC (“Baker Counsel”), and by CBC.

9. On August 9, 2004, the Corporate Debtors and the Parsons sent a letter via certified mail return receipt requested and regular mail to both CBC and Linus L. Baker, who, prior to the revocation of his ability to appear before this Court pro hac vice in the Corporate Debtors’ and Parsons’ Chapter 11 cases on August 5, 2004, had served as counsel to CBC in these matters.

10. That letter enclosed a proposed Joint Motion for Sanctions from the Corporate Debtors and Parsons regarding the Revocation Motions and advised that if said Motions were not withdrawn within twenty-one (21) days of the date of the letter, then the Corporate Debtors and Parsons intended to seek sanctions regarding the Revocation Motions.

11. The Revocation Motions have not been withdrawn at any time.

12. On August 13, 2004, G Finance filed its Objection to the Revocation Motions with this Court.

13. On September 3, 2004, the Corporate Debtors and Parsons filed their Joint Objection to the Revocation Motions.

14. On September 14, 2004, the Corporate Debtors and Parsons filed the Joint Rule 11 Motion.

15. The Corporate Debtors and the Parsons filed the Joint Rule 11 Motion more than twenty-one (21) days after CBC and Baker Counsel were served with the draft of the Joint Rule 11 Motion.

16. On September 15, 2004, this Court convened a hearing regarding the Revocation Motions. No one appeared on behalf of CBC or Linus Baker. The Court denied the Revocation

Motions and announced that it would memorialize its ruling on those Motions in a written opinion and/or order.

17. On September 30, 2004, this Court entered its Opinion and Order denying the Revocation Motions on the grounds that, *inter alia*,

- CBC did not bring the Revocation Motions as adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7001(5) (“Bankruptcy Rule 7001(5)”);
- The Revocation Motions were not timely filed within 180 days of the entry of the Confirmation Orders pursuant to 11 U.S.C. § 1144 and Bankruptcy Rule 9024(3);
- The Revocation Motions did not assert or demonstrate that the Confirmation Orders were procured by fraud pursuant to 11 U.S.C. § 1144;
- The Revocation Motions failed to support their contention that a party in interest may circumvent the 180 day limitation upon revocation of confirmation by seeking relief under Bankruptcy Rule 9024 or Federal Rule of Civil Procedure 60 (“Federal Rule 60”);
- The Revocation Motions failed to support their contention that CBC was deprived of due process during the confirmation processes;
- CBC waived and/or abandoned any objections it might have had to confirmation of the Corporate Debtors’ or the Parsons’ Chapter 11 Plans by failing to appear to prosecute those objections;
- The Revocation Motions are barred by *res judicata* because they constitute an impermissible collateral attack on the provisions of the Confirmation Order; and

- By failing to appeal the Confirmation Orders, CBC waived any challenges it might have had to the alleged deficiencies in the Confirmation Orders in a procedurally proper fashion.

18. CBC has purported to appeal from the Opinion and Order denying the Revocation Motions.

III. The Motion to Compel

19. On July 22, 2004, CBC filed its Motion to Compel Expert Report or in Alternative Order Precluding the Use of Expert Testimony (the “Motion to Compel”) in the Corporate Debtors’ Chapter 11 cases, in which CBC sought to have this Court compel the Debtors to turn over any expert report prepared or held by them pursuant to Federal Rule 26 and Bankruptcy Rule 7026 as part of certain litigation between CBC and the Corporate Debtors relating to proofs of claim filed by CBC in the Corporate Debtors’ Chapter 11 cases (the “Corporate Claim Litigation”).

20. The Motion to Compel was presented to the Court by Baker Counsel, acting as Counsel for CBC, and by CBC.

21. The Motion to Compel did not contain a certification that Baker Counsel had communicated or attempted to communicate with the Corporate Debtors’ Counsel in a good faith attempt to obtain the requested expert report prior to filing the Motion to Compel.

22. On August 9, 2004, the Corporate Debtors sent a letter via certified mail return receipt requested and regular mail to both CBC and Baker Counsel.

23. That letter enclosed a proposed Motion for Sanctions from the Corporate Debtors regarding the Motion to Compel and advised that if said Motion was not withdrawn within

twenty-one (21) days of the date of the letter, then the Corporate Debtors intended to seek sanctions regarding the Motion to Compel.

24. The Motion to Compel has not been withdrawn at any time.

25. On September 2, 2004, the Corporate Debtors filed their Objection to the Motion to Compel.

26. On September 13, 2004, the Corporate Debtors filed the Corporate Debtors' Rule 11 Motion.

27. The Corporate Debtors filed their Rule 11 Motion more than twenty-one (21) days after CBC and Baker Counsel were served with the draft of the Corporate Debtors' Rule 11 Motion.

28. On September 15, 2004, this Court convened a hearing regarding the Motion to Compel. No one appeared on behalf of CBC or Linus Baker. The Court denied the Motion to Compel and announced that it would memorialize its ruling on that Motion in a written opinion and/or order.

29. On September 23, 2004, this Court entered its Order denying the Motion to Compel on the grounds that, *inter alia*,

- The pretrial orders entered by this Court with regard to the Corporate Claims Litigation specifically provided that Bankruptcy Rule 7026 did not apply in that pending litigation.
- The Motion to Compel did not allege and was not accompanied by any statement alleging that CBC conferred, or made any efforts to confer, with the Debtors' counsel regarding the subject matter of the Motion to Compel before filing that Motion and, thus CBC failed to comply with the "meet and confer" requirements of Federal Rule 37 and Bankruptcy Rule 7037 such that the Motion to Compel could be granted; and

- CBC’s attempt to evade the “meet and confer” requirements of Federal Rule 37 and Bankruptcy Rule 7037 by alleging that the Motion to Compel comprised a “motion in limine”, rather than a discovery motion, lacked support in the Federal Rules.

30. CBC has purported to appeal from the Opinion and Order denying the Motion to Compel.

Based upon these findings of fact, and this Court’s review of the files and the record in the Corporate Debtors’ Chapter 11 bankruptcy cases and the Parsons’ Chapter 11 bankruptcy case, this Court now having considered the documents and pleadings described hereinabove, and being apprised in the premises, now issues its Conclusions of Law as follows:

A. This Court has jurisdiction over these Chapter 11 cases and the present matters under 28 U.S.C. § 1334.

B. These matters are core proceedings under, without limitation, 28 U.S.C. §§ 157(b)(2)(A) and (O).

C. Venue of these proceedings is proper in this district under 28 U.S.C. §§ 1408 and 1409.

D. Federal Rule of Bankruptcy Procedure 9011 (“Bankruptcy Rule 9011”) provides that by presenting to a bankruptcy court (whether by signing, filing, submitting, or later advocating), a pleading, written motion or other paper, an attorney or unrepresented party certifies that to the best of his or her knowledge, information and belief, formed after a reasonable inquiry, (a) the document is not being presented for any improper purpose, (b) the legal contentions therein are warranted by existing law or by a nonfrivolous argument for a change or extension of law, and (c) the factual allegations therein have evidentiary support or,

after a reasonable opportunity for further investigation or discovery, are likely to have evidentiary support. See Fed. R. Bankr. P. 9011(b)

E. The Revocation Motions were asserted by CBC and Baker Counsel without a reasonable inquiry into the facts and law in that (i) a review of Bankruptcy Rule 7001(5) would have revealed that an action to revoke an order of confirmation in a Chapter 11 case must be brought as an adversary proceeding; (ii) a review of Bankruptcy Rule 9024 and section 1144 of the Bankruptcy Code would have revealed both the 180 day time limitation for revocation of a confirmation order and the limited grounds therefor; and (iii) a review of this Court's dockets of the filed documents in the Corporate Debtors' and the Parsons' Chapter 11 cases would have revealed that the Confirmation Orders were entered in excess of 180 days prior to the filing of the Revocation Motions. As a result, those Motions violated Bankruptcy Rule 9011(b).

F. The legal contentions contained in the Revocation Motions were not warranted by existing law or by a nonfrivolous argument for a change of law in that (i) a review of the statutory law would have revealed that revocation of a confirmation order is unavailable outside of the 180 day bar contained in 11 U.S.C. § 1144 and Bankruptcy Rule 9024 absent a lack of notice as to the plan provisions; (ii) the Motions' contentions that the claims asserted by CBC against the Corporate Debtors and Parsons are non-core fail to recognize well-established and controlling Supreme Court law including, but not limited to, Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (per curiam) and Katchen v. Landy, 382 U.S. 323, 336-37 (1966), which hold that a claimant who makes a claim in a bankruptcy court against a bankruptcy estate subjects itself to the bankruptcy court's equitable jurisdiction over that claim; and (iii) the Motions fail to recognize the authority that provides that failure to raise an objection at confirmation or failure to appeal from the confirmation order entered after that hearing precludes any later attack of a

confirmation order. See In re Chappell, 984 F.2d 775, 782 (7th Cir. 1993); Adair v. Sherman, 230 F.3d 890, 894 (7th Cir. 2000) (following Chappell); see, e.g., United States v. Richman (In re Talbot), 124 F.3d 1201, 1209 (10th Cir. 1997); Trulis v. Barton, 107 F.3d 685, 691 (9th Cir. 1997); In re Varat Enterps., 81 F.3d 1310, 1315-18 (4th Cir. 1996); In re Szostek, 886 F.2d 1405, 1413 (3d Cir. 1989); Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050-54 (5th Cir. 1987). As a result, those Motions violated Bankruptcy Rule 9011(b)(2).

G. The Revocation Motions were asserted for an improper purpose, that is, to attempt to collaterally attack the Corporate Debtors' and the Parsons' Chapter 11 Plans after the time statutorily allotted therefor. CBC waived any rights it might have had with regard to the Confirmation Orders by failing to prosecute its objections to the Chapter 11 Plans during the confirmation processes, failing to appeal the entry of the Confirmation Orders in the Corporate Debtors' or Parsons' Chapter 11 cases, failing to request or obtain a stay of confirmation in those Chapter 11 cases, and failing timely to request revocation of the Confirmation Orders. As a result, the Revocation Motions were brought to harass and abuse the Corporate Debtors and Parsons, and accordingly, those Motions violated Bankruptcy Rule 9011(b)(1).

H. The Revocation Motions also were brought for an improper purpose in that they appear to have been precipitated by this Court's ruling, in Adv. No. 03-3016, that CBC and Baker Counsel, among others, are barred, by the entry and finality of the Confirmation Orders, from pursuing certain causes of action. See generally Caldwell-Baker Co. v. Southern Ill. Railcar Co., No. 03-3016, slip op. at 9-10 (Bankr. S.D. Ill. June 21, 2004).

I. The Motion to Compel was asserted by CBC and Baker Counsel without a reasonable inquiry into the facts and law in that a review of the pretrial orders in the Corporate

Claims Litigation would have revealed the inapplicability of Bankruptcy Rule 7026 in that Litigation. As a result, that Motion violated Bankruptcy Rule 9011(b).

J. The legal contentions contained in the Motion to Compel were not warranted by existing law or by a nonfrivolous argument for a change of law in that (i) a review of the pretrial orders in the Corporate Claims Litigation would have revealed the inapplicability of Bankruptcy Rule 7026 in that Litigation; and (ii) neither CBC nor Baker Counsel contacted the Corporate Debtors' Counsel with regard to the subject matter of the Motion to Compel prior to its filing, and the Motion was not accompanied by a certification of a good faith attempt to resolve, pursuant to Bankruptcy Rule 7037. As a result, that Motion violated Bankruptcy Rule 9011(b)(2).

K. The factual allegations contained in the Motion to Compel were not well grounded in fact, nor did they have evidentiary support (or were they likely to have evidentiary support after a reasonable opportunity for further investigation or discovery). Specifically, while the Motion to Compel asserts that the Corporate Debtors have not complied with the requirements of Bankruptcy Rule 7026(a)(2), the pretrial orders entered by this Court clearly provide that Bankruptcy Rule 7026 does not apply in the Corporate Claims Litigation. As a result, the Motion to Compel violated Bankruptcy Rule 9011(b)(3).

L. Moreover, the Motion to Compel was asserted for an improper purpose, that is, to attempt to require the Corporate Debtors to turn over expert reports, the production of which is not required under the pretrial orders governing the Corporate Claims Litigation, or, alternatively, to put the Corporate Debtors to the trouble and expense of responding to the Motion to Compel. As a result, the Motion to Compel violated Bankruptcy Rule 9011(b)(1).

M. Under Bankruptcy Rule 9011(c), if this Court determines that subdivision (b) of that Rule has been violated, it may award sanctions against the offending attorneys, law firms and parties.

N. Further, 28 U.S.C. § 1927 authorizes this Court to award the excess costs, expenses and attorneys' fees incurred by a party against an attorney who multiplies the proceedings in any case "unreasonably and vexatiously." See 28 U.S.C. § 1927.

O. Finally, both 11 U.S.C. § 105(a) and this Court's inherent authority allow it to issue sanctions against clients and their attorneys for abusive litigation practices undertaken in bad faith. These sanctions may include an award of reasonable attorneys' fees and expenses.

P. The Revocation Motions and Motion to Compel demonstrate the disregard that CBC and Baker Counsel have for the Bankruptcy Code, the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, and proper practice and procedure generally.

Q. This Court previously has sanctioned CBC and Baker Counsel jointly and severally in the amount of \$15,000 as a result of certain discovery abuses by those parties. See In re Southern Ill. Railcar Co., No. 02-30456, slip op. at 5 (Bankr. S.D Ill. July 23, 2004).

R. In a related adversary proceeding, this Court previously has sanctioned CBC, Baker Counsel, and The Baker Group, L.C. ("Baker Group"), an affiliate of CBC, in the cumulative amount of \$50,000 as a result of certain egregious conduct in that adversary proceeding and pursuant to the Corporate Debtors' requests for sanctions therein pursuant to 28 U.S.C. § 1927 and 11 U.S.C. § 105(a), Parsons' request for sanctions therein pursuant to Federal Rule 11 and Bankruptcy Rule 9011, and this Court's own motion pursuant to Bankruptcy Rule 9011. See Caldwell-Baker Co. v. Southern Ill. Railcar Co., No. 03-3016, slip op. at 15-16 (Bankr. S.D. Ill. Aug. 5, 2004). In that same proceeding and order, this Court also sanctioned

CBC, Baker Counsel, and the affiliate of CBC by revoking Baker Counsel's ability to appear before this Court *pro hac vice* on behalf of CBC or any of its related entities. See id. at 16.

S. None of the previous monetary sanctions by this Court have served to deter CBC or Baker Counsel from continuing to file motions and other pleadings without a reasonable investigation into their bases prior to filing; from filing motions lacking bases in fact and evidence; from filing motions containing claims, defenses and other legal contentions unsupported by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; or from acting to harass the Corporate Debtors and the Parsons, and their creditors, by filing these unfounded documents and attempting to increase the already substantial costs of litigation associated with CBC's and Baker Counsel's conduct in these proceedings.

T. This Court must conclude that the conduct by CBC and Baker Counsel in filing, and in refusing to withdraw the Revocation Motions and the Motion to Compel, was willful and intentional and part of a pattern of behavior by CBC and Baker Counsel in the Corporate Debtors' and the Parsons' Chapter 11 cases. Moreover, because Baker Counsel is in-house counsel for CBC, has represented CBC in matters involving the Corporate Debtors and the Parsons since the inception of the underlying business transaction between CBC and SIRC in 1997, see Caldwell-Baker Co. v. Southern Ill. Railcar Co., 183 F. Supp. 2d 1301, 1302 (D. Kan. 2001), and is in fact the brother of the principal of CBC, this Court must conclude that not only Baker Counsel, but also CBC itself, have been involved in the prosecution of the present matters against the Corporate Debtors and the Parsons. Further, the Revocation Motions and the Motion to Compel constitute vexatious multiplications of the proceedings brought by CBC and Baker

Counsel against the Corporate Debtors and the Parsons in that they were not filed with any valid objective or for any legitimate purpose.

U. Therefore, as and for a monetary sanction to deter CBC and Linus L. Baker from continuing to engage in the type of conduct described hereinabove, and particularly as and for the filing of the Revocation Motions and the Motion to Compel, and pursuant to Bankruptcy Rule 9011, 28 U.S.C. § 1927 and 11 U.S.C. § 105(a), this Court awards the Corporate Debtors sanctions in the amount of Fifty Thousand Dollars (\$50,000.00) jointly and severally against CBC and Linus L. Baker. Said amount is to be paid directly to the Corporate Debtors.

V. Further, as and for a monetary sanction to deter CBC and Linus L. Baker from continuing to engage in the type of conduct described hereinabove, and particularly as and for the filing of the Revocation Motions, and pursuant to Bankruptcy Rule 9011, 28 U.S.C. § 1927 and 11 U.S.C. § 105(a), this Court awards the Parsons sanctions in the amount of Fifty Thousand Dollars (\$50,000.00) jointly and severally against CBC and Linus L. Baker. Said amount is to be paid directly to the Parsons.

The Court has entered another order this date striking the claim of the Baker Entities. The primary, but certainly not the only, reason for entering this order is to deter future conduct of the Baker Entities that would hinder, delay or obstruct the orderly conclusion of this case. The striking of the claim effectively eliminates the Baker Entities as parties to these proceedings. Thus, should this Court's order striking the claim be sustained upon appeal, an appeal that is certain to occur based on the history of this case, a reconsideration of the sanctions imposed in this order may well be warranted. Therefore, the imposition and execution of this order is stayed pending a final resolution of this Court's order striking the claim of the Baker Entities.

Counsel for the Corporate Debtors and Parsons, respectively, shall serve a copy of this Order by mail on all interested parties not receiving electronic notice.

ENTERED: November 24, 2004

/s/ Kenneth J. Meyers

UNITED STATES BANKRUPTCY JUDGE